87-1333

No.

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHY DENT, Individually and on Behalf of ANDREW DENT, a Minor, and Independent Executrix of the Estate of GENE GILBERT DENT, Deceased,

Petitioner,

vs.

THE CITY OF DALLAS, TEXAS, FRANK REED, and LARRY EDDINGTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS AT DALLAS

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QUESTION PRESENTED FOR REVIEW

Does a plaintiff under 42 U.S.C. §1983 state a cause of action by alleging that a defendant City has adopted a policy of negligence resulting in damages to the plaintiff or is she also required, as the Texas courts have held, to allege that her injuries were the result of an intentional act taken by an employee of the municipal defendant?

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No.

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OPINIONS BELOW

This petition seeks review of the judgment and opinion of the Court of Appeals for the Fifth Judicial District of Texas at Dallas affirming in part and reversing in part the judgment entered by the trial court. While plaintiffs received a favorable jury verdict, later reversed, on their state cause of action in this personal injury and wrongful death suit arising under the laws of the State of Texas, their civil rights cause of action, the subject of this Petition, was dismissed by the trial court. That dismissal was affirmed on appeal by the Texas Court of Appeals at Dallas, in an opinion reported at 733 S.W.2d 290 (Tex.App. - Dallas 1987, writ ref'd n.r.e.). (See Appendix A).

Application to the Supreme Court of Texas for review and correction of this ruling was made, but Petitioner's application for writ of error was denied by order entered October 14, 1987. 31 Texas Supreme Court Journal 14. (See Appendix). Rehearing of the application was sought but denied by order entered November 18, 1987. 31 Texas Supreme Court Journal 74. (See Appendix C).

JURISDICTION

The jurisdiction of this Court is invoked on the basis of 28 U.S.C. §1257(3) because rights arising under the Constitution of the United States are claimed.

The decision of the Texas Supreme Court denying Petitioner's application for rehearing was denied by Order of that Court dated November 18, 1987. This petition is filed within 90 days of that date as required by 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides, in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. §1983 provides:

§1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a suit for personal injuries, wrongful death, and violation of civil rights incurred in an automobile collision. The collision was precipitated by the high-speed police chase of a suspect wanted on a charge of forging a prescription for drugs. It resulted in the death of Dr. Gilbert Dent who was otherwise unconnected with the police chase.

Dr. Dent's widow, his son, and his parents brought suit against Allen Davis, the driver of the automobile that hit Dr. Dent, against the Dallas police officers who were chasing Davis, and against the City of Dallas, employer of the police officers.

Plaintiffs alleged that the City was responsible for the actions of its police officers, that their actions were pursuant to City of Dallas policy, and that those actions violated Dr. Gilbert Dent's civil rights and deprived Dr. Dent of his life, liberty, and property without due process of law. Plaintiffs further alleged that the City of Dallas was negligent in its training, monitoring, and enforcing of safe police procedures.

Plaintiffs sued police officer Frank Reed individually, alleging that he was negligent and had violated Dr. Dent's civil rights and constitutional protections by (1) failing to effect the arrest of Allen Davis, (2) initiating and then failing to discontinue his chase of the suspect under the conditions that existed at the time, (3) failing to observe prudent chase policy in pursuing Allen Davis, and (4) using excessive force in his pursuit of Allen Davis.

Trial was to a jury which found that the accident was caused 80% by the negligence of Allen Davis and 20% by the negligence of Officer Frank Reed. (Tr. 79). The jury found the total damage resulting from the accident to be $1,500,000. (Tr. 81, 83).

On the civil rights claim, the Texas trial court held, as a matter of law, that plaintiffs had not established a cause of action under 42 U.S.C. §1983. The Dallas Court of Appeals affirmed the trial court's refusal to submit the civil rights action against both the City and Officer Reed. *Dent v. City of Dallas*, 729 S.W.2d 114, 117 (Tex. App. - Dallas 1986, writ ref'd n.r.e.). [See Appendix A]. The Texas Supreme Court refused to review this holding. [See Appendix B].

REASONS FOR GRANTING THE WRIT

Plaintiffs Did State a Cause of Action Under 42 U.S.C. §1983 Because That Constitutional Tort Is Fully Established by Proof of a City's Adoption of a Policy of Negligence and Requires No Allegation or Proof of Intentional Conduct.

The Texas Court of Appeals at Dallas dealt with plaintiffs' civil rights claim in a single paragraph reproduced here in its entirety:

> Plaintiffs' contention that they stated and proved a cause of action under 42 U.S.C. §1983 is also without merit. A review of the record shows no commission of a constitutional tort on the part of either Officer Reed or the city. Even if duty, negligence and proximate cause were proven, the United States Supreme Court has recently held that the due pro-

> cess clause is not implicated by a State official's *negligent* act that causes unintended loss of, or injury to life, liberty, or property. *Daniels v. Williams,* 474 U.S. 327 (1986). Plaintiffs have pleaded only negligence and have neither pleaded nor proved that Officer Reed or the city *intended* to take Dr. Dent's life without due process of law. Consequently, no cause of action under 42 U.S.C. §1983 has been shown.

Dent v. City of Dallas, 729 S.W.2d 114, 117 (Tex.App. - Dallas 1986, writ ref'd n.r.e.) [emphasis in original]. The Texas court's conclusion on this point of constitutional law is clearly and demonstrably wrong, and this Court's writ should issue in order that the obvious error in this opinion, resulting in the loss of plaintiffs' cause of action, may be corrected.

Although numerous authorities were cited to the Texas court on this point, the opinion chose to place sole reliance on this Court's opinion in *Daniels v. Williams,* 474 U.S. 327 (1986). That case holds that "the due process clause is not implicated by a State official's negligent act that causes unintended loss of, or injury to life, liberty, or property." 729 S.W.2d at 117. But, from this correct statement of the *Daniels* holding, the *Dent* opinion leaps to the entirely unjustified conclusion that only "intentional" conduct is now encompassed in a §1983 action. This conclusion ignores the caveat of *Daniels* that only "merely negligent conduct" is outside the reach of a §1983 due process claim. 88 L.Ed. at 667.

This Court reaffirmed in *Daniels* the principle that the guarantee of due process still applies "to deliberate decisions of government officials to deprive a person of life, liberty or property." *Id.,* at 668 [emphasis in orig-

inal]. As this Court held in *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), nearly a decade ago, the adoption of a policy of negligence is just such a deliberate denial of due process and is actionable under §1983.

Even assuming, *arguendo,* that the *Daniels* holding means that the Dents have no §1983 cause of action against Officer Frank Reed, the *Daniels* case clearly has nothing to say on the issue of the City of Dallas' §1983 liability. The style of the case alone proves the Court of Appeals' error: *Roy E. Daniels v. Andrew Williams.* No city, prison, state, or other governmental unit was a defendant in *Daniels;* merely an individual jail officer. The *Daniels* opinion has nothing to say on governmental liability, and, of course, nothing to say on the viability of plaintiffs' claim that the City of Dallas' adoption of a policy of negligence in this case has proximately caused their injuries. To the extent that the Court of Appeals relied on the *Daniels* case to uphold the dismissal of the Dents' §1983 cause of action *against the City,* it clearly relied on no authority at all.

The jury in this case found that the tortious conduct was undertaken pursuant to the City of Dallas' official police chase and arrest procedures. They found, moreover, that Officer Reed's failure to use available communication devices and failure to arrest Allen Davis when given the chance proximately caused the death of Dr. Dent. In this context, negligence is largely an irrelevant concept: the cause of action consists in the adoption of a policy which countenances negligence as a city's official policy—it does not require that the policy be negligently adopted. Thus, there is strict liability, as it were, for a city's action in adopting or pursuing a policy of negligence.

In *Daniels v. Williams*, the alleged constitutional tort consisted in one jailor's single act of negligently leaving a pillow on a staircase. As noted above, the plaintiff in *Daniels* did not bring suit against the jail. By contrast, plaintiffs herein do not ground their §1983 claim against the City of Dallas on a single act of negligence occurring on the night of Dr. Dent's death, as the opinion implies. Rather, they allege that a constitutional tort was committed when the City of Dallas adopted and maintained a policy which permitted their police officers negligently to effect arrest and/or to offer chase.

The rule announced in *Monell v. Dept. of Social Services*, that there is liability for the adoption of a policy of negligence, was recently reaffirmed by this Court's holding in *Pembaur v. Cincinnati*, ... U.S. ....., 89 L.Ed.2d 452 (1986); *see also Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987). It is *Pembaur*, and not *Daniels*, which addresses the question of municipal or other governmental liability for constitutional torts. *Pembaur* clearly holds that such liability can be based on the negligent act of a municipal employee that is undertaken pursuant to an official policy of the city. The Texas Court of Appeals' two novel conclusions, that "intentional" conduct is required, and that *Daniels* somehow speaks to the question of municipal liability, are simply wrong.

The Supremacy Clause requires that the Texas Court of Appeals follow the authorities of this Court on this point of constitutional law. This petition for writ of certiorari should be granted in order that the Dents' §1983 cause of action, as recognized by the decisions of this Court, may be enforced.

CONCLUSION

For the foregoing reasons, Petitioner Kathy Dent, individually and on behalf of Andrew Dent and the Estate of Gene Gilbert Dent, prays that this Honorable Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Texas Court of Appeals for the Fifth Judicial District and remand this cause for reinstatement and trial of plaintiffs' civil rights cause of action.

Respectfully submitted,

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APPENDIX

APPENDIX A

Kathy DENT, et al., Appellants,

v.

The CITY OF DALLAS, et al., Appellees.

No. 05-85-00478-CV.

Court of Appeals of Texas,
Dallas.

Nov. 20, 1986.

Rehearing Denied May 15, 1987.

Surviving spouse and parents of injured driver brought action against police officers and city to recover damages caused by motorist who crashed with injured driver during chase by police officers. The 298th District Court, Dallas County, Sid Fitzwater, J., rendered judgment for surviving spouse and son and against city and one officer in amount of $100,000, denied all relief sought by parents, and denied recovery under §1983. Surviving spouse and parents appealed. The Court of Appeals, Hollingsworth, J., held that: (1) police officer, who failed to arrest motorist who drove away and crashed with injured driver, owed no duty to protect traveling public from motorist's actions in attempting to escape after being stopped; (2) motorist's grossly negligent behavior in fleeing from police officer and ignoring all traffic laws during flight was sole proximate cause of crash with injured driver and relieved officers of liability; and (3) police officer's negligent failure to arrest motorist did not deprive injured driver of due process and did

not deprive driver of constitutional right under color of state law, where loss of life was unintended.

Reversed and take nothing judgment ordered.

1. Municipal Corporations (Key) 747(3)

Police officer, who failed to arrest motorist who drove away and crashed with injured driver, owed no duty to protect traveling public from motorist's actions in attempting to escape after being stopped by officer, owed duty that was public in nature as required for enforcement of criminal law, and was not negligent, even though officer had probable cause to arrest. V.T.C.A., Civil Practice & Remedies Code § 101.001 et seq.

2. Automobiles (Key) 201(1)

Motorist's grossly negligent behavior in fleeing from police officer and ignoring all traffic laws during flight was sole proximate cause of crash with injured driver and relieved officers of liability. V.T.C.A., Civil Practice & Remedies Code § 101.001 et seq.

3. Civil Rights (Key) 13.8(4)

Police officer, who failed to arrest motorist who drove away and crashed with injured driver, was performing discretionary function and acting in good faith and was entitled to qualified immunity from liability. 42 U.S.C.A. § 1983; V.T.C.A., Civil Practice & Remedies Code § 101.001 et seq.

4. Civil Rights (Key) 13.7

City could not be liable under doctrine of respondeat superior for actions of police officer who was entitled to qualified immunity from liability for failing to arrest

motorist who drove away and crashed with injured driver. 42 U.S.C.A. § 1983; V.T.C.A., Civil Practice & Remedies Code § 101.001 et seq.

5. Constitutional Law (Key) 255(2)

Police officer's allegedly negligent failure to arrest motorist who drove away and crashed with injured driver did not deprive injured driver of due process under color of state law, where loss of life was unintended. U.S.C.A. Const.Amends. 5, 14; 42 U.S.C.A. § 1983.

Windle Turley, Darrell Panethiere, Dallas, for appellants.

Analeslie Muncy, City Atty., Douglas H. Conner, Jan W. Fletcher, Asst. City Attys., Dallas, for appellees.

Before AKIN, HOWELL and HOLLINGSWORTH, JJ.

HOLLINGSWORTH, Justice.

The principal question on this appeal is the liability of the city and its police officer for fatal injuries to an innocent motorist in a collision with a vehicle being pursued by the officer. Plaintiffs are the executor and statutory beneficiaries of the deceased motorist. They appeal from a judgment on a partially favorable verdict denying several elements of the damages alleged. Defendants City of Dallas and its officers present cross-points asserting their non-liability for any amount. We sustain the defendants' cross-points and render judgment that plaintiffs take nothing. Consequently, we do not reach any of the plaintiffs' points of error.

On July 30, 1981, Dallas police officer Frank Reed was advised by a police dispatcher that a suspect, later

identified as Allen Davis, was attempting to pass a forged prescription at a Revco drug store at the corner of Forest Lane and Greenville Avenue in Dallas. Officer Reed was then informed that the suspect had left the drug store and was heading southbound on Greenville Avenue. Officer Reed was given a detailed description of Davis and the car that he was driving. In an effort to intercept Davis, Officer Reed proceeded northbound on Greenville. After driving a short distance on Greenville, Officer Reed spotted Davis stopped at a red light at the corner of Greenville and Park Lane. Officer Reed made a U-turn, turned on his lights and pulled up behind Davis. After seeing that Davis had acknowledged his presence, Officer Reed left his squad car, walked up to Davis's automobile, and looked inside to confirm that no one besides Davis was in the automobile. After insuring that Davis was alone and that he had his hands on the wheel, Officer Reed directed him to pull off onto the shoulder of the road. Although the officer had probable cause to arrest Davis, Officer Reed chose not to do so, opting instead to wait for back-up assistance. When Officer Reed ordered Davis to pull off the road, Davis acknowledged the order and began to pull off to the shoulder. As Officer Reed turned to go back to the squad car, Davis sped off, running the red light at Park Lane and Greenville to effectuate his escape.

Officer Reed, after reporting to the police dispatcher that Davis was "running," began pursuit. Hearing this report and being in the neighborhood, Officer Larry Eddington joined in the chase. Officers Reed and Eddington pursued Davis for less than one mile and a little more than a minute before Davis ran a stop sign and collided with a car driven by plaintiffs' decedent Dr.

Gene Gilbert Dent. Dr. Dent was severely injured as a result of the collision and died of his injuries eight days later.

Dr. Dent's widow, Kathy Dent, as executor of the estate and on behalf of Dr. Dent's son, Andrew Dent, along with Dr. Dent's parents, I.O. and Mavis Dent, sued Officers Reed and Eddington and the City of Dallas. The suit alleged that Officer Reed was negligent in (1) failing to arrest Davis, (2) instituting a high speed chase of Davis, and (3) pursuing Davis for part of the chase without his siren activated. The suit alleged further that Officer Eddington was negligent in joining in and continuing the chase, and that the City of Dallas was liable both for enacting the policies under which Officers Reed and Eddington were acting and under the principle of respondeat superior. The petition also attempted to allege a cause of action against Reed, Eddington and the city under 42 U.S.C. § 1983 for deprivation of civil rights.

At the close of trial the jury answered all except two of the issues in favor of plaintiffs. Acting upon the jury's answers to the special issues, the trial court rendered judgment for Kathy and Andrew Dent and against the City of Dallas and Officer Frank Reed in the amount of $100,000. The judgment denied all relief sought by Mavis and I.O. Dent and denied recovery sought to any plaintiff under 42 U.S.C. § 1983.

Plaintiffs present various points of error complaining of the amount of their recovery and the denial of recovery by Mavis and I.O. Dent. The city brings three cross-points asserting that: (1) the Dents failed to establish a cause of action under the Texas Tort Claims Act; (2) the court erred in holding Officer Reed liable for

his discretionary actions; and (3) the court erred in finding joint liability where there was neither an affirmative finding of negligence on the part of Officer Reed relating to the manner of operation of his vehicle nor a finding of negligence in continuing the pursuit.

The essential elements of actionable negligence consist of the following: a legal duty owed by one person to another; a breach of that duty; and damage proximately resulting from such a breach. *Abalos v. Oil Development Co.*, 544 S.W.2d 627, 631 (Tex.1976); *Ronk v. Parking Concepts of Texas, Inc.*, 711 S.W.2d 409, 411 (Tex.App.—Forth Worth 1986, no writ); *Producers Grain Corp. v. Lindsay*, 603 S.W.2d 326 (Tex.Civ.App.—Amarillo 1980, no writ). The existence of a legal duty under a given set of facts and circumstances is a question of law for the court to decide. *Abalos*, 544 S.W.2d at 631; *Producers Grain Corp.*, 603 S.W.2d at 329. Negligence cannot exist unless there is a duty owed to the injured person; where no duty is owed to that person, no legal liability can arise on account of negligence. *Abalos*, 544 S.W.2d at 631; *Applebaum v. Nemon*, 678 S.W.2d 533, 535 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Rushing v. International Aviation Underwriters, Inc.*, 604 S.W.2d 239, 243 (Tex.Civ.App.—Dallas 1980, writ ref'd n.r.e.).

Whether a police officer owes a specific duty to one injured or killed by a person whom the officer had probable cause to arrest, but either elected not to do so or made an inadequate attempt to arrest, is a question of first impression in this state. In those states that have addressed this question the courts have uniformly held that the officer's duty is a duty to the public at large to enforce the criminal law and that the officer owes no

specific duty to the individual injured. *See Wilson v. City of Tucson,* 8 Ariz.App. 398, 402, 446 P.2d 504, 508 (1968); *Shore v. Town of Stonington,* 187 Conn. 147, 150-54, 444 A.2d 1379, 1381-82 (1982); *Trautman v. City of Stamford,* 32 Conn.Sup. 258, 259-63, 350 A.2d 782, 783-85 (1975); *Evett v. City of Inverness,* 224 So.2d 365, 366-67 (Fla.Dist.Ct.App.1969).

[1] Appellants are seeking to hold the City of Dallas and one of its police officers liable for the officer's discretionary decisions as to if, how, and when to arrest a person suspected of attempting to pass a forged prescription. If we were to uphold the finding of liability on the part of Officer Reed for his actions, then, to avoid liability, police officers would have to *arrest all persons* stopped by them for whatever reason (be it jaywalking, expired license tags, etc.) lest these persons attempt escape and cause injury to somebody during their flight from justice. Sound jurisprudence as well as the public interest could not tolerate such a holding. Accordingly, we hold that any duty that Officer Reed had at the time in question was public in nature, as required for enforcement of the criminal law, and that he neither owed nor breached any duty to protect the traveling public, including Dr. Dent, from the suspect's actions in attempting to escape. *See Wilson,* 8 Ariz.App. at 402, 446 P.2d at 508; *Shore,* 187 Conn. at 150-54, 444 A.2d at 1381-82; *Trautman,* 32 Conn.Sup. at 259-63, 350 A.2d at 783-85; *Evett,* 224 So.2d at 366-67; *Maksinczak v. Salliotte,* 140 Mich.App. 537, 539, 364 N.W.2d 737, 739 (1985); 2 Cooley, Torts (4th ed.) § 300; 63 Am.Jur.2d *Public Officers and Employees,* § 287; 65 C.J.S. *Negligence* § 4(8); Annot., 41 A.L.R.3d 700 (1972).

[2] Furthermore, we hold that under the circumstances of this case, the sole proximate cause of the accident as a matter of law was Davis's grossly negligent behavior in fleeing from Officer Reed and by ignoring all traffic laws during his flight until he crashed into Dr. Dent. The question of a police officer's liability to an innocent third party, who is injured or killed in an accident involving a suspect being pursued by the officer, has never been addressed in Texas. In the jurisdictions where this question has arisen, the majority of courts have found no liability on the part of the officers. The rationale for these decisions is that the sole proximate cause of the accident is the suspect's negligent conduct and not the officer's conduct in electing to pursue the lawbreaker. Simply stated, courts will not make police officers the insurers for the conduct of the suspects they pursue. *See United States v. Hutchins,* 268 F.2d 69, 72 (6th Cir.1959); *State of West Virginia v. Fidelity and Casualty Co. of N.Y.,* 263 F.Supp. 88, 90-91 (S.D.W.Va. 1967); *Pagels v. City and County of San Francisco,* 135 Cal.App.2d 152, 153-56, 286 P.2d 877, 878-79 (1955); *Draper v. City of Los Angeles,* 91 Cal.App.2d 315, 318, 205 P.2d 46, 48 (1949); *City of Miami v. Horne,* 198 So.2d 10, 12-13 (Fla.1967); *Downs v. Camp,* 113 Ill.App.2d 221, 227, 252 N.E.2d 46, 50 (1969); *Bailey v. L.W. Edison Charitable Foundation,* 152 Ind.App. 460, 466, 284 N.E.2d 141, 145 (1972); *Thornton v. Shore,* 233 Kan. 737, 753, 666 P.2d 655, 668 (1983); *Chambers v. Ideal Pure Milk Co.,* 245 S.W.2d 589, 590-91 (Ky.1952); *Oberkramer v. City of Ellisville,* 706 S.W.2d 440, 442 (Mo.1986); *Lee v. City of Omaha,* 209 Neb. 345, 348, 307 N.W.2d 800, 803 (1981); *Blanchard v. Town of Kearny,* 145 N.J.Super. 246, 248, 367 A.2d 464, 465 (Law Div.1976); *Roll v. Timberman,* 94 N.J.Super. 530, 536, 229 A.2d 281, 284 (1967); *Silva v. City of Albu-*

querque, 94 N.M. 332, 333, 610 P.2d 219, 220 (Ct.App. 1980); *Mitchell v. State,* 108 A.D.2d 1033, 1034, 486 N.Y. S.2d 97, 99 (1985); *Simmen v. State,* 81 A.D.2d 398, 400, 442 N.Y.S.2d 216, 218 (1981); *Stanton v. State,* 29 A.D.2d 612, 612-14, 285 N.Y.S.2d 964, 967-69 (1967); *Wrubel v. State,* 11 Misc.2d 878, 879-81, 174 N.Y.S.2d 687, 689-90 (Ct.Cl.1958); *McMillan v. Newton,* 63 N.C.App. 751, 753, 306 S.E.2d 470, 472 (1983); *Jackson v. Olson,* 77 Or.App. 41, 44-47, 712 P.2d 128, 130-31 (1985); Annot., 4 A.L.R.4th 865 (1981); Annot., 83 A.L.R.2d 452 (1962). *Contra Tetro v. Town of Stratford,* 189 Conn. 601, 603-07, 458 A.2d 5, 7-8 (1983); *Fiser v. City of Ann Arbor,* 417 Mich. 461, 471-75, 339 N.W.2d 413, 417-418 (1983); *Kuzmics v. Santiago,* 256 Pa.Super. 35, 38-41, 389 A.2d 587, 589-90 (1978).

[3, 4] Assuming, arguendo, that plaintiffs could show that Officer Reed had a duty to Dr. Dent, that Officer Reed breached that duty, and that such breach was a proximate cause of the injuries complained of, Officer Reed and the city would still not be liable to the Dents. The only actions which the jury found Officer Reed did that constituted negligence concerned his decisions as to how and when to arrest Davis. Since Officer Reed was a nonjudicial government official, performing a discretionary function and acting in good faith, he is entitled to immunity under the doctrine of qualified immunity. *Anderson v. Higdon,* 695 S.W.2d 320, 324 (Tex.App.—Waco 1985, no writ). Again, because Officer Reed cannot be liable, the city cannot be liable under the doctrine of respondeat superior.

[5] Plaintiffs' contention that they stated and proved a cause of action under 42 U.S.C. § 1983 is also without merit. A review of the record shows no commission of a constitutional tort on the part of either Officer Reed

or the city. Even if duty, negligence and proximate cause were proven, the United States Supreme Court has recently held that the due process clause is not implicated by a State official's *negligent* act that causes unintended loss of, or injury to life, liberty, or property. *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 663-67, 88 L.Ed.2d 662 (1986). Plaintiffs have pleaded only negligence and have neither pleaded nor proved that Officer Reed or the city *intended* to take Dr. Dent's life without due process of law. Consequently, no cause of action under 42 U.S.C. § 1983 has been shown.

Because the points of error we have discussed are dispositive of the appeal, we need not address the remaining points of error. The judgment of the trial court is reversed and judgment is hereby rendered that appellants take nothing from appellees Frank Reed and the City of Dallas.

APPENDIX B

SUPREME COURT OF TEXAS
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Mary M. Wakefield, Clerk

October 14, 1987

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RE: Case No. C-6558

STYLE: KATHY DENT, INDIVIDUALLY AND ON BEHALF OF ANDREW DENT, A v. THE CITY OF DALLAS, TEXAS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk
By /s/ Blanca E. Morin

Deputy

APPENDIX C

SUPREME COURT OF TEXAS
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November 18, 1987

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RE: Case No. C-6558

STYLE: KATHY DENT, INDIVIDUALLY AND ON BEHALF OF ANDREW DENT, A v. THE CITY OF DALLAS, TEXAS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully, yours,

Mary M. Wakefield, Clerk
By /s/ Peggy Littlefield
Chief Deputy

87-1333

No.

Supreme Court, U.S.
FILED
FEB 4 1988
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHY DENT, Individually and on Behalf of ANDREW DENT, a Minor, and Independent Executrix of the Estate of GENE GILBERT DENT, Deceased,
Petitioner,

vs.

THE CITY OF DALLAS, TEXAS, FRANK REED, and LARRY EDDINGTON,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS AT DALLAS

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COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00478-CV

KATHY DENT, ET AL.
APPELLANT

v.

THE CITY OF DALLAS, ET AL.

ORDER

It is ORDERED that the motion for rehearing filed by appellants, Kathy Dent, Individually and on Behalf of Andrew Dent, a Minor, and as Independent Executrix of the Estate of Gene Gilbert Dent, Deceased, I. O. Dent, and Mavis Dent, is OVERRULED.

May 15, 1987.

/s/ Gordon Rowe
Gordon Rowe
Justice

NO. 82-6424-M

IN THE
DISTRICT COURT OF DALLAS COUNTY, TEXAS
298TH JUDICIAL DISTRICT

KATHY DENT, Individually and on Behalf of ANDREW DENT, a Minor, and as Independent Executrix of the Estate of GENE GILBERT DENT, Deceased, I.O. DENT and MAVIS DENT,
Plaintiffs,

versus

THE CITY OF DALLAS, TEXAS, FRANK REED and LARRY EDDINGTON,
Defendants,

versus

ALLEN DOUGLAS DAVIS,
Third-Party Defendant.

JUDGMENT

On October 15, 1984, Plaintiffs Kathy Dent, Individually and on Behalf of Andrew Dent, a Minor, and as Independent Executrix of the Estate of Gene Gilbert Dent, Deceased, and I.O. Dent and Mavis Dent appeared and announced ready for trial, as did Defendants City of Dallas, Texas, Frank Reed and Larry Eddington. Third-Party Defendant Allen Douglas Davis did not attend the trial of this cause, either in person or by legal counsel.

A jury of twelve individuals and two individual alternates was duly impaneled and sworn and heard the evidence. Prior to submission of Special Issues and final arguments of counsel to the jury, a juror became ill,

was duly excused by the Court with agreement of all counsel, and was replaced by the first alternate juror. Thereafter the Court read its Charge and the jury heard and considered the arguments of counsel. The Court excused the remaining alternate juror prior to commencement of deliberation.

In response to special issues, definitions, and explanatory instructions submitted to them in the Charge of the Court, ten jurors made findings which were receceived by the Court and were filed and entered of record on the minutes of the Court.

In addition to the findings made by the jurors, Defendants City of Dallas, Frank Reed and Larry Eddington stipulated that "reasonable and necessary medical expenses in Dallas County, Texas, incurred by Decedent as a result of the incident made the basis of this suit was $9,025," and that "reasonable and necessary funeral and burial expenses in Dallas County, Texas, incurred as a result of the incident made the basis of this suit were $3,791."

Plaintiffs moved to disregard the jury's answer to Special Issue No. 2 and moved for judgment on the verdict. Defendant Larry Eddington moved for judgment on the verdict, and Defendants City of Dallas and Frank Reed moved for judgment non obstante veredicto. After reasonable notice of the motions was given to all parties, the Court duly heard and considered the motion, the evidence, and arguments of counsel. The Court decided the issues presented by these motions in its "Memorandum Decision and Order" entered on January 17, 1985, which is incorporated herein by reference. In accordance therewith:

It is ORDERED, ADJUDGED and DECREED that Kathy Dent, in her individual capacity, in her capacity as next friend of Andrew Dent, and in her capacity as independent executrix of the Estate of Gene Gilbert Dent, shall recover from defendants, the City of Dallas, Texas, and Frank Reed, jointly and severally, the sum of one hundred thousand dollars ($100,000).

It is also ORDERED, ADJUDGED and DECREED that the City of Dallas, Texas, and Frank Reed shall have contribution from defendant Allen Douglas Davis in the sum of eighty thousand dollars ($80,000).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs shall take nothing from defendant Larry Eddington, and that Plaintiffs Mavis Dent and I.O. Dent shall take nothing from any defendant.

Costs of Court are taxed against Plaintiff Kathy Dent. All relief not expressly granted is denied.

Signed: February 01, 1985.

/s/ Sid Fitzwater
Sid Fitzwater, District Judge

APPROVED AS TO FORM:

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NO. 87-1333

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

KATHY DENT, *Individually and on Behalf of* ANDREW DENT, *a Minor, and as Independent Executrix of the Estate of* GENE GILBERT DENT, *Deceased,*
Petitioner,

vs

THE CITY OF DALLAS, TEXAS, FRANK REED, *and* LARRY EDDINGTON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS IN DALLAS

RESPONDENTS' REPLY

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STATEMENT OF THE CASE

Petitioner's statement of the case is essentially correct, but incomplete. Notably absent is a description of the actions of the Dallas Police officer upon which Petitioner bases her entire case.

Officer Reed stopped a vehicle driven by Allen Davis because Davis was a suspected felon. Officer Reed got out of his patrol car and instructed Davis to pull his vehicle on to the side of the road. As Officer Reed returned to the patrol car, Davis sped away. A high speed chase involving additional patrol cars ensued, and Davis ran a stop sign striking the vehicle driven by Petitioner's husband. Petitioner's only claim is that because Officer Reed's vehicle was equipped with a public address system, he should have used it in his attempt to apprehend Davis. From these facts Petitioner alleges that the City of Dallas has an official policy tantamount to negligence.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

THE TRIAL COURT, TEXAS COURT OF APPEALS, AND TEXAS SUPREME COURT CORRECTLY RULED THAT PETITIONERS FAILED TO PROVE A CAUSE OF ACTION UNDER 42 U.S.C. §1983.

This Court has repeatedly held that Plaintiffs who obtain a judgment under traditional tort principles are not normally entitled to a civil rights recovery. *Baker v. McCollan,* 443 U.S. 137; *Martinez v. The State of California,* 444 U.S. 277, 283 (1980), reh. denied 445 U.S. 920; *Hull v. City of Duncanville,* 678 F.2d 582 (5th Circuit, 1982); *Jackson v. City of Joliet,* 715 F.2d 1200 (7th Circuit, 1983), cert. denied 465 U.S. 1049, 104 S.Ct. 1325 (1984). Yet, Petitioner would have this Honorable Court rule that the general policy of the City of Dallas to have police officers arrest and pursue felons is a policy tantamount to negligence, entitling her to a civil rights recovery.

Although there was no evidence to support their finding, the jury found that a police officer was negligent in this case. They also found, reasonably, that the City of Dallas has a policy of arresting and pursuing felons, and that the officer was attempting to carry out those policies. The jury did *not* find that the negligent conduct of the police officer was required by the policy of the City. The jury merely found that the officer was implementing the broad policies of the City by attempting to arrest a suspected felon, and pursuing him when he fled. The fact that the officer may have been negligent on this single occasion does not prove a municipal policy of negligence.

It is well established by this Court that an isolated incident of negligence or excessive force is not sufficient to raise a

cause of action under 42 U.S.C. §1983. *City of Oklahoma City vs. Tuttle,* 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427, reh. denied 473 U.S. 925. In *Tuttle,* this Court clearly identified the pitfalls of asserting that a municipal policy gives rise to a §1983 cause of action:

> ... some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation, some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force. But Monell must be taken to require proof of a City policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.' At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. *Id.* at 471 U.S. 823, 85 L.Ed2d 804.

This Court's caveat in *Tuttle* to avoid stretching a policy to countenance a remote event is ignored by Petitioner. Petitioner asserts that because the City of Dallas has a policy of arresting and pursuing felons, any negligent conduct by an officer in implementing those procedures is itself a policy of the City.

Petitioner's attempt to base her contentions on the holdings in *Monell* ignores the obvious distinctions between the two cases. As the Court stated in *Tuttle:*

> The "policy" of the New York City Department of Social Services that was challenged in Monell was a policy that by its terms compelled pregnant employees to take mandatory leaves of absence before such leaves

were required for medical reasons; this policy in and of itself violated the constitutional rights of pregnant employees by reason of our decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791, 67 Ohio Ops2d 126 (1974). Obviously, it requires only one application of a policy such as this to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy... To establish the constitutional violation in Monell, no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise; ...
Tuttle at 471 U.S. 822, 85 L.Ed.2d 803.

Petitioner has not identified any policy of the City of Dallas which, on its face, is negligent, nor were there jury findings to that effect. In fact, the City of Dallas' pursuit policies were examined in great detail by Petitioner's experts. Although Petitioner criticized some of the wording of the City's policies, she did not question or challenge the basic due care requirement contained in the City's policies. (Statement of Facts pages 357-360, 850). The Center for Police Development at Southern Methodist University conducted a three year study of the City's pursuit activities and noted that there were no serious disabling injuries or deaths resulting therefrom. (Statement of Facts pages 1218-1303). Petitioner has failed to show any pattern of civil rights violations on the part of the City of Dallas Police Department. To the contrary, the City of Dallas' safety figures were superior to any of the national statistics presented by the Petitioner. (Statement of Facts pages 651-655)

Also mitigating against Petitioner's assertion of a civil rights cause of action is the jury's answer to Special Issue

Number 8. The jury did not find negligence in the training of the police officers, and Petitioner failed to obtain any findings suggesting that improper or insufficient training had a causal relationship to a deprivation of constitutional rights, as is required by current law. *Rizzo v. Goode,* 423 U.S. 362, 370 (1976); *Hays v. Jefferson County,* 668 F.2d 869, 872 (6th Circuit, 1982), cert. denied 459 U.S. 833; *Merchant v. City of Little Rock,* 741 F.2d 201, 205 (8th Circuit, 1984).

This Court has recently considered the question of determining when tortious conduct by state officials rises to the level of a constitutional tort:

> . . . lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law . . . Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society . . . Where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required. . .
> *Daniels v. Williams,* 474 U.S. 327, 88 L.Ed.2d 662 (1986).

Petitioner alleges that the principles espoused in *Daniels* are inapplicable to the instant case. However, Petitioner fails to consider the last sentence quoted above which obviously addresses the situation involved here.

Petitioner's reliance on *Pembauer v. Cincinnati,* 475 U.S. __, 89 L.Ed.2d 452 (1986), "and not Daniels" is perplexing because the two cases are consistent in holding that there is

a distinction between policies of a municipality and merely negligent acts of municipal employees who are attempting to carry out those policies. *Pembauer* is also consistent with the holding in *Tuttle:*

> The conclusion that tortious conduct, to be the basis for municipal liability under §1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. [footnote omitted] Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"-that is, acts which the municipality has officially sanctioned or ordered.
> *Pembauer* at 89 L.Ed.2d 463.

Even assuming that Officer Reed was negligent, Petitioner has failed to prove that the City of Dallas has an unconstitutional policy regarding the arrest and pursuit of suspected felons.

CONCLUSION

Clearly, the District Court, the Texas Court of Appeals, and the Supreme Court of Texas correctly followed the principles espoused by this Court, and correctly held that the facts alleged by Petitioner do not support a cause of action under 42 U.S.C. §1983.

Respectfully submitted,

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